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## COMMENTS

### NEPA AND THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION: THE FOREIGN POLICY EXCLUSION

Congress enacted the National Environmental Policy Act<sup>1</sup> (NEPA) to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment."<sup>2</sup> Since its passage, there have been numerous attempts to determine the scope of NEPA's extraterritorial reach,<sup>3</sup> but due to the vagueness of the statute, the question is far from settled.<sup>4</sup> "Extraterritoriality is essentially . . . a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders."<sup>5</sup>

The general presumption is that "unless a contrary intent appears, [statutes are] meant to apply only within the territorial jurisdiction of the United States."<sup>6</sup> This is "based on the assumption that Congress is pri-

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1. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4361 (1988)).

2. 42 U.S.C. § 4321 (1988).

3. See *infra* part II.A-F, H.

4. Compare *Greenpeace U.S.A. v. Stone*, 748 F. Supp. 749, 759 (D. Haw. 1990) ("NEPA's legislative history illuminates nothing in regard to extraterritorial application." (quoting *National Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1367 (D.C. Cir. 1981)) and *Environmental Defense Fund, Inc. v. Massey*, 772 F. Supp. 1296, 1297 (D.D.C. 1991) ("The Court cannot ferret out a clear expression of Congress' intention that NEPA should apply beyond the territorial jurisdiction of the United States.") with *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 536 (D.C. Cir. 1993) ("Section 102(2)(C), on its face, is clearly not limited to actions of federal agencies that have significant environmental effects within U.S. borders[.]" and "Congress, when enacting NEPA, was concerned with worldwide as well as domestic problems facing the environment.").

5. *Massey*, 986 F.2d at 530.

6. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). For a review of the development of the extraterritoriality principle see Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U.L. Rev. 598, 603-08 (1990).

marily concerned with domestic conditions.”<sup>7</sup> Additionally, the presumption “protect[s] against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>8</sup> Congress may, however, provide for the enforcement of its laws outside the United States.<sup>9</sup> To do so, Congress must show, through statutory language, an “indication of a congressional purpose to extend [the law’s] coverage beyond places over which the United States has sovereignty or has some measure of legislative control.”<sup>10</sup> If, however, such indication of intent is not clearly and affirmatively shown, a court must presume that the statute was not meant to apply extraterritorially.<sup>11</sup>

Two recent cases have presented courts with the opportunity to reexamine the statute and further define NEPA’s extraterritorial application. In *Environmental Defense Fund, Inc. v. Massey*,<sup>12</sup> the issue before the United States Court of Appeals for the District of Columbia Circuit was whether the National Science Foundation’s incineration of food and domestic waste in Antarctica required the preparation of an Environmental Impact Statement (EIS).<sup>13</sup> In mandating compliance with NEPA’s EIS provisions, the court held that “the presumption against the extraterritorial application of statutes . . . does not apply where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in Antarctica.”<sup>14</sup> The court limited its decision to Antarctica and the global commons, declining to decide whether NEPA applied to actions involving sovereign foreign nations.<sup>15</sup> In *NEPA Coalition of Japan v. Aspin*,<sup>16</sup> the United States District Court for the District of Columbia was faced with applying NEPA to conduct occurring in a sovereign foreign nation. *NEPA Coalition* involved complaints by a United States citizen and a

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7. *Foley Bros.*, 336 U.S. at 285. *Accord* Equal Employment Opportunity Comm’n v. Arabian American Oil Co. (ARAMCO), 499 U.S. 244, 248 (1991) (Congress legislates against the backdrop of the presumption against extraterritoriality).

8. *ARAMCO*, 499 U.S. at 248 (citations omitted).

9. *Id.* Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). “[A] state has jurisdiction to prescribe law with respect to (1)(a) conduct that, wholly or in substantial part, takes place within its territory; . . . (c) conduct outside its territory that has or is intended to have a substantial effect within its territory.” *Id.*

10. *ARAMCO*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285).

11. *Id.*

12. 986 F.2d 528 (D.C. Cir. 1993).

13. *Id.* at 529.

14. *Id.*

15. *Id.* at 537.

16. 837 F. Supp. 466 (D.D.C. 1993).

number of Japanese citizens concerning the United States Navy's operations in Japan.<sup>17</sup> In reaching its decision that NEPA did not apply, the court found Navy operations in Japan were not analogous to those of the National Science Foundation in Antarctica and even if they were, foreign policy interests outweighed the benefits of preparing an EIS.<sup>18</sup>

This Comment critically examines the extraterritorial application of the National Environmental Policy Act. Part I reviews the statutory implementation and policy behind NEPA. Part II examines NEPA litigation and the most recent decisions which suggest a continued vitality of the extraterritorial doctrine in its application to NEPA. Part III discusses policy considerations behind the limitation on extraterritorial application of NEPA, as well as cases promoting its extraterritorial application. This Comment concludes that Congress should modify the language of NEPA to specify, with some limitations, its extraterritorial application.

## I. STATUTORY LAW AND ITS POLICY BASIS

### A. *National Environmental Policy Act*

In enacting NEPA, Congress recognized that the use of modern technology had caused many unforeseen and dangerous consequences.<sup>19</sup> Furthermore, it believed that America's capacity to deal with environmental problems would be enhanced if "Congress clarifie[d] the goals, concepts, and procedures which determine and guide the programs and the activities of Federal agencies."<sup>20</sup> It also found that an "independent review of the interrelated problems associated with environmental quality was of

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17. See Pl.'s 1st Am. Compl. at 6-42, *NEPA Coalition of Japan v. Cheney* (No. 91-1522), *decided sub nom.* *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993). The three major areas covered in the complaint are: (1) Flight operations from U.S. and joint facilities with the associated noise and crash hazards; (2) Safety to navigation and the danger of collisions in the Tokyo Bay; and (3) General environmental degradation around U.S. military facilities. *Id.* at 48-59.

18. *NEPA Coalition*, 837 F. Supp. at 467.

19. Some of the side effects mentioned include radioactive waste, runoff of nitrogen fertilizers into rivers, smog from automobiles, pesticide residue, and topsoil destruction. H.R. REP. NO. 378, 91st Cong., 1st Sess. 3 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751, 2753.

20. S. REP. NO. 296, 91st Cong., 1st Sess. 6 (1969). Significantly, for interpreting the focus of the Act, when discussing the bill, the Senate Committee referred to "*our Nation's* natural resources," and determined that, "a congressional statement is required of the evolving *national* objectives of managing *our* physical surroundings, *our* land, air, water, open space and other natural resources and environmental amenities." *Id.* (emphasis added). However, in its Explanation of Amendments, the Committee stated that one of the goals of § 102's procedures and principles was "to support appropriate activities designed to deal with international environmental problems." *Id.* at 7.

critical importance."<sup>21</sup> Through NEPA, Congress intended to "promote efforts which [would] prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."<sup>22</sup> In order to accomplish this goal, the Senate put certain "action-enforcing" procedures into NEPA.<sup>23</sup> It required that "to the fullest extent possible . . . all agencies of the federal government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on . . . the environmental impact of the proposed action."<sup>24</sup> The Act, however, is silent on whether this EIS requirement is applicable outside the United States. NEPA merely recognizes "the worldwide and long-range character of environmental problems[,] and where consistent with the foreign policy of the United States, [directs] lend[ing] appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."<sup>25</sup>

#### B. Executive Order 12,114

Recognizing NEPA's gap in coverage, Executive Order 12,114 was promulgated to "further[ ] the purpose of the National Environmental Policy Act . . . consistent with the foreign policy and national security policy of the United States."<sup>26</sup> The Order directs agencies approving actions outside the United States to prepare an analysis of the environmental impact and consider it in their decision making process.<sup>27</sup> The type of analysis required varies with the category of the Federal action.<sup>28</sup> The

21. H.R. REP. NO. 378 at 3, *supra* note 19, reprinted in 1969 U.S.C.C.A.N. at 2753.

22. 42 U.S.C. § 4321 (1988).

23. S. REP. NO. 296, 91st Cong., 1st Sess. 19 (1969).

24. 42 U.S.C. § 4332.

25. *Id.* § 4332(2)(F). Many commentators argue that NEPA is applicable outside the United States stressing the broad nature and scope of its language. See George H. Keller, Note, *Greenpeace U.S.A. v. Stone: The Comprehensive Environmental Impact Statement and the Extraterritorial Reach of NEPA*, 14 U. HAW. L. REV. 751 (1992); R. David Kitchen, Comment, *NEPA's Overseas Myopia: Real or Imagined?*, 71 GEO. L.J. 1201 (1983); Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353 (1982).

26. Exec. Order No. 12,114 § 1-1, 3 C.F.R. 356 (1980), reprinted in 42 U.S.C. § 4321 (1988).

27. *Id.* § 2-3.

28. *Id.* § 2-4. Potential documents include:

(i) environmental impact statements (including generic, program and specific statements); (ii) bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign na-

Executive Order also provides for certain exemptions from, and allows for considerations to, the requirement for environmental analysis. The exemptions may be classified into three categories: Presidential exclusion, no general impact, and critical importance.<sup>29</sup> Additionally, certain broad policy considerations allow an agency to modify the contents, timing, and availability of the document in order to meet national goals.<sup>30</sup> Significantly, the Order states that it shall not be construed to create a cause of action.<sup>31</sup>

## II. CASE LAW SHOWS COURTS RECOGNIZE A FOREIGN POLICY EXCEPTION TO NEPA

Since NEPA's passage, federal courts have attempted to determine whether the Act is applicable to those actions that have little or no impact on the United States but have, instead, an impact on a foreign country.<sup>32</sup> Over time case law has developed that suggests where the foreign policy considerations are significant, courts will refrain from enforcing NEPA

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tions, or by an international body or organization in which the United States is a member or participant; or (iii) concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents.

*Id.*

29. *Id.* § 2-5(a). Actions taken by the President, § 2-5(a)(ii). Those falling within the no general impact category include: actions not having a significant effect on the environment outside the United States as determined by the agency, § 2-5(a)(i); and votes and other actions in international conferences and organizations, § 2-5(a)(vi). Those actions falling within the critical importance category include: actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of armed conflict, § 2-5(a)(iii); intelligence activities and arms transfers, § 2-5(a)(iv); nuclear export licenses, § 2-5(a)(v); and disaster and emergency relief action, § 2-5(a)(vii).

30. *Id.* § 2-5(b). Documents may be modified to:

(i) enable the agency to decide and act promptly as and when required; (ii) avoid adverse impacts on foreign relations or infringement in fact or in appearance of other nations' sovereign responsibilities, or (iii) ensure appropriate reflection of: (1) diplomatic factors; (2) international commercial, competitive and export promotion factors; (3) needs for governmental or commercial confidentiality; (4) national security considerations; (5) difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action; and (6) the degree to which the agency is involved in or able to affect a decision to be made.

*Id.*

31. *Id.* § 3-1. The section states: "[t]his Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant effects of their actions on the environment outside the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action." *Id.*

32. See discussion *infra* parts II.A-F, H.

extraterritorially.<sup>33</sup>

A. *Wilderness Society v. Morton*

The first case to apply NEPA in an extraterritorial setting was *Wilderness Society v. Morton*.<sup>34</sup> In *Wilderness Society*, the United States Court of Appeals for the District of Columbia Circuit allowed a Canadian citizen and a Canadian environmental organization to intervene in litigation concerning compliance with NEPA prior to issuance of a permit for the trans-Alaska pipeline.<sup>35</sup> Domestic groups concerned with the potential effect of the pipeline filed an action in federal court and the Canadians sought to intervene on the ground that the American groups would not protect Canadian interests.<sup>36</sup> The *Wilderness Society* court found that either of the two proposed routes for the pipeline—across Canada to the United States or terminating at a supertanker port in Valdez, Alaska, for seaborne shipment to the lower states—would have a potentially severe impact on Canada.<sup>37</sup> The court held that “the interests of the United States and Canadian environmental groups [were] sufficiently antagonistic” to grant the application for intervention.<sup>38</sup>

Although the court had allowed foreign nationals to intervene in the litigation, this did not raise any foreign policy questions. Indeed, while other appellees had objected to the Canadians’ presence in the litigation, the government had not.<sup>39</sup> Judge Tamm, in his concurring opinion, stated that he saw “no problem with regard to separation of powers or interference with the conduct of foreign relations” in the issue before the court.<sup>40</sup> Thus, although the court had applied NEPA extraterritorially for the first

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33. See discussion *infra* parts II.A-F, H.

34. 463 F.2d 1261 (D.C. Cir. 1972) (*per curiam*).

35. *Id.* at 1261.

36. *Id.* At that time a preliminary injunction had already been granted and the Secretary of Commerce was preparing and circulating an impact statement to support the project. *Id.* at 1261-62.

37. *Id.* at 1262. While the danger to Canada of the overland route was obvious to the court, some of the potential impacts from the seaborne shipment option included damage to British Columbia’s fishing and logging industries and harm to Canada’s shoreline recreational property that might be caused by a tanker running aground. *Id.*

38. *Id.* The court also noted that permitting the intervention would not in any way delay the litigation. *Id.*

39. *Id.* at 1262 n.2. The Canadian appellants were concurrently appearing before the Secretary of the Interior in the administrative proceedings related to the pipeline. The court found no reason why they should not be allowed to participate in judicial proceedings as well. *Id.*

40. *Id.* at 1263 (Tamm, J., concurring).

time, it had already recognized that foreign policy considerations may at times outweigh the benefits of an EIS.

### B. *People of Enewetak v. Laird*

In *People of Enewetak v. Laird*,<sup>41</sup> the United States District Court for the District of Hawaii held that NEPA was applicable to federal actions in the Trust Territory of the Pacific Islands.<sup>42</sup> *Enewetak* involved the use of the atoll for experiments to determine the vulnerability of strategic defenses to nuclear attack.<sup>43</sup> In order to conduct the tests, large areas of the islands would be cleared of vegetation and topsoil before detonating high explosives to determine the "cratering" effect of a simulated nuclear weapon.<sup>44</sup> In its analysis, the *Enewetak* court first examined the language of the statute to determine whether NEPA applied in this context.<sup>45</sup> Finding the statute "silent on the extent of its coverage," the court inspected the legislative history and general aim of the Act to determine the legislature's intent.<sup>46</sup> The *Enewetak* court concluded that "NEPA is not restricted to United States territory delimited by the fifty states."<sup>47</sup> It based this conclusion on the lawmakers' use of the broader term "Nation" where one would expect to find the more limiting term "United States."<sup>48</sup> In fact, the court found NEPA "phrased so expansively that

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41. 353 F. Supp. 811 (D. Haw. 1973).

42. *Id.* at 819.

43. *Id.* at 814.

44. *Id.*

45. *Id.* at 815.

46. *Id.*

47. *Id.* at 816.

48. *Id.* The court cited as an example 42 U.S.C. § 4331(b) which states in part:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that *the nation* may . . . .

and 42 U.S.C. § 4341, which deals with Presidential Environmental Quality Reports, setting forth:

(1) the status and condition of the major natural, manmade, or altered environmental classes of *the Nation* . . . (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of *the Nation*; (3) the adequacy of available natural resources for fulfilling human and economic requirements of *the Nation* in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals . . . .

*Id.* (emphasis in original).



there appears to have been a conscious effort to avoid the use of restrictive or limiting terminology."<sup>49</sup>

Comparing the status of the peoples of the Trust Territory to that of the Canadian citizens in *Wilderness Society v. Morton*,<sup>50</sup> the court found that peoples of the Trust Territory had a stronger justification for protection because they did not have an independent government to protect them.<sup>51</sup> Instead, they were forced to rely on the government of the United States.<sup>52</sup> In its consideration of the relationship of Enewetak to the United States, the court examined the United Nations Trusteeship Agreement and the negotiations leading up to it.<sup>53</sup> The final Trusteeship Agreement gave the administering authority "full powers of administration, legislation and jurisdiction" over the territory.<sup>54</sup> The original language was even more specific, in that it would have included the words, "as an integral part of the United States."<sup>55</sup> Although this phrase was eventually deleted, the United States reaffirmed before the United Nations Security Council that United States authority over the Trust Territory should in no way be considered lessened by this deletion, and the people of Enewetak would have all the protections enjoyed by United States citizens.<sup>56</sup> The *Enewetak* court did not consider its application of

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49. *Id.* Accordingly, the court cited with approval the United States Court of Appeals for the District of Columbia Circuit which concluded that "[t]he sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action." *Id.* at 817 (quoting *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971)).

50. 463 F.2d 1261 (D.C. Cir. 1972) (per curiam).

51. *People of Enewetak v. Laird*, 353 F. Supp. 811, 818 (D. Haw. 1973).

52. *Id.*

53. *Id.* at 818-19.

54. *Id.* at 818 n.12. The complete text of the United Nations Trusteeship Agreement Article 3 reads:

The administering authority [the United States] shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.

*Id.* (quoting 1 Whiteman, DIG. INT'L. L. 777-78 (June 1963)).

55. *Id.* at 818. The words were stricken from the agreement upon objection of the Soviet Union. *Id.* at 818-19.

56. *Id.* at 819 (quoting U.N. SCOR, 2d Sess., 116th mtg. at 473 (1947)). The U.S. Representative went on to say:

My Government feels that it has a duty towards the peoples of the trust territory to govern them with no less consideration than it would govern any part of its sovereign territory. It feels that the laws, customs and institutions of the United States form a basis for the administration of the trust territory compatible with the spirit of the Charter. For administrative, legislative and jurisdictional conven-

NEPA to be outside the jurisdiction of the United States.<sup>57</sup> Instead, the court based its decision on the finding that the people of Enewetak were subject to the authority of the United States even though they were not citizens and lived outside the fifty states.<sup>58</sup>

### C. *Sierra Club v. Adams*

The next opportunity for a court to examine NEPA's extraterritorial reach came about in *Sierra Club v. Adams*.<sup>59</sup> There, a decision enjoining United States participation in construction of the Darien Gap Highway in Panama and Colombia due to an allegedly deficient EIS was challenged by federal officials.<sup>60</sup> The United States District Court for the District of Columbia determined that the Department of Transportation's EIS was insufficient.<sup>61</sup> Specifically, the court found that the EIS had "inadequately examined the environmental impact of the highway about three matters: 1) the control of aftosa, or foot-and-mouth disease; 2) possible alternative routes for the highway; and 3) the effect on the Cuna and Choco Indians inhabiting the area that the highway was expected to traverse."<sup>62</sup>

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the general application of NEPA to the project was not in contention. The government conceded that the Sierra Club had standing to challenge the EIS with regard to the possible spread of aftosa, and

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ience in carrying out its duty towards the peoples of the trust territory, the United States intends to treat the trust territory as if it were an integral part of the United States.

*Id.* (emphasis omitted).

57. The court found it "unnecessary to decide [the] question" of whether the statute applied extraterritorially due to its inclusion of Enewetak Atoll within the "Nation" protected by NEPA. *Id.* at 817 n.10.

58. *Id.* at 818.

59. 578 F.2d 389 (D.C. Cir. 1978).

60. *Id.* at 390. The 250 mile paved road would complete the last phase of the Pan American Highway which runs from Prudhoe Bay, Alaska, to Santiago, Chile. *Id.*

61. *Id.* at 391 (citing *Sierra Club v. Coleman*, 421 F. Supp. 63 (D.D.C. 1976) (*Coleman II*), vacated, 578 F.2d 389 (1978)). The Sierra Club had originally brought a suit against the government alleging that the government failed to prepare any EIS. The district court granted the motion and enjoined the government from further participation on the project until completing an EIS. See *Sierra Club v. Coleman*, 405 F. Supp. 53 (D.D.C. 1975), vacated, 578 F.2d 389 (1978) (*Coleman I*). Sierra Club commenced the later proceeding after the government had prepared an EIS and filed notice of its intent to resume construction. *Coleman II*, 421 F. Supp. 63.

62. *Adams*, 578 F.2d at 391 (citing *Coleman II*, 421 F. Supp. at 65-67).

the court agreed.<sup>63</sup> However, the government contended the Sierra Club lacked standing to challenge the EIS on potential alternatives to the project and effects on the Indian population.<sup>64</sup> The *Adams* court rapidly disposed of the question of jurisdiction over the potential alternatives to the project.<sup>65</sup> As the court saw the issue, it was merely an extension of the aftosa control problem in which the no-action alternative would protect the United States from spread of the disease.<sup>66</sup> The issue of the effect of the proposed highway on the Indians presented a more difficult question for the court.<sup>67</sup> In its determination of standing, the court relied on the Supreme Court's statement in *Sierra Club v. Morton*<sup>68</sup> that "the fact of . . . injury is what gives a person standing to seek judicial review under the statute [in question], but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate."<sup>69</sup> The *Adams* court found the public interest concept "particularly applicable to cases brought under NEPA."<sup>70</sup> This was especially true as "[a]n interpretation that unnecessarily restricts the ability of plaintiffs properly before the court to challenge additional inadequacies in an environmental impact statement would be patently inconsistent with the unequivocal legislative intent embodied in NEPA that agencies comply with its requirements 'to the fullest extent possible.'"<sup>71</sup> Because the Sierra Club established an independent basis to challenge the impact statement, the *Adams* court ultimately granted them standing on their claim that the EIS did not adequately address the effect of construction on the Cuna and Choco Indians.<sup>72</sup> In reaching its decision, the court had merely "assumed" that NEPA was fully applicable to construction in Panama.<sup>73</sup> Recognizing the applicabil-

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The court noted that the appellees had not alleged any specific harm that they would suffer in the event the issue was inadequately discussed. *Id.* at 391-92.

68. 405 U.S. 727 (1972).

69. *Sierra Club v. Adams*, 578 F.2d 389, 392 (D.C. Cir. 1978) (citing *Morton*, 405 U.S. at 737) (alterations in original).

70. *Id.*

71. *Id.* at 393 (citing 42 U.S.C. § 4332).

72. *Id.*

73. *Id.* at 392 n.14 (emphasis added). Later, the United States District Court for the District of Columbia also assumed that an EIS was required under NEPA for the spraying of a herbicide over marijuana plants in Mexico due to the spraying's potential impact in the United States. See *National Org. for Reform of Marijuana Laws (NORML) v. United States*, 452 F. Supp. 1226 (D.D.C. 1978).

ity of NEPA outside the United States had not been settled, the court left "resolution of [that] important issue to another day."<sup>74</sup>

*D. Natural Resources Defense Council v. Nuclear Regulatory Commission*

In *Natural Resources Defense Council v. Nuclear Regulatory Commission*, (NRDC),<sup>75</sup> the United States Court of Appeals for the District of Columbia Circuit was presented with the opportunity to resolve the question it left unanswered in *Sierra Club v. Adams*,<sup>76</sup> whether an environmental impact statement must be prepared where any potential impact would be solely within a foreign nation.<sup>77</sup> NRDC involved the license and export of a nuclear reactor and fuel to the Republic of the Philippines.<sup>78</sup> The Nuclear Regulatory Commission (NRC) had concluded that the export of the reactor met all the conditions of the Atomic Energy Act,<sup>79</sup> as amended by the Nuclear Non-Proliferation Act.<sup>80</sup> Specifically, the NRC found the exportation of the reactor "would not create unacceptable health, safety or environmental risks to U.S. territory or the global commons."<sup>81</sup> In a second order, the Commission declared it would "only consider those health, safety, and environmental impacts arising from exports of nuclear reactors that affect the territory of the United States or the global commons."<sup>82</sup> The Natural Resources Defense Council (NRDC) appealed the Commission's orders, contending that in addition to not meeting the obligations of the Atomic Energy Act,<sup>83</sup> the NRC failed in meeting its NEPA requirement to conduct a site-specific envi-

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74. *Sierra Club v. Adams*, 578 F.2d 389, 392 n.14 (D.C. Cir. 1978). Although the appellees took the position that NEPA applied whether the impact occurred in the United States or in another country, the government had intimated that NEPA might not apply to "purely local concerns" outside the United States. *Id.*

75. 647 F.2d 1345 (D.C. Cir. 1981).

76. 578 F.2d 389 (D.C. Cir. 1978); *see supra* notes 73, 74 and accompanying text.

77. NRDC v. NRC, 647 F.2d 1345, 1347-48.

78. *Id.* at 1348.

79. 42 U.S.C. §§ 2011-2297 (1988).

80. 22 U.S.C. §§ 3201-3282 (1988).

81. NRDC v. NRC, 647 F.2d at 1348 (quoting Westinghouse Electric Corp., 11 N.R.C. 631 (1980)).

82. *Id.* at 1348 (quoting Westinghouse Electric Corp., 11 N.R.C. 672 (1980)).

83. *Id.* at 1355. The NRDC contended that not taking into account the 32,000 U.S. military personnel stationed near the reactor site and potential effects on the Republic of the Philippines or on U.S. prestige in the event of an accident resulted in "a meaningless NRC finding that . . . export . . . would not be inimical to the 'common defense and security' of the United States or to the 'health and safety of the public.'" *Id.*

ronmental impact statement.<sup>84</sup>

In its examination of foreign impacts, the *NRDC* court first noted that export licensing decisions occur within the United States, but "export of any commodity across national boundaries calls into play, and sometimes into conflict, the national interests of the exporter-country and the importer-country."<sup>85</sup> In the court's view, conditioning export licenses on U.S. standards would impact on a foreign sovereign's domestic law as much as a law whose explicit purpose was to compel foreign behavior. Therefore, the court concluded, the extraterritorial principle governs, thus limiting the reach of the U.S. statute.<sup>86</sup> This limitation would not, however, withstand "an unequivocal mandate from Congress" because "[w]here a statute directs an agency of the United States to consider foreign environmental impacts no court of the United States will contravene the will of Congress."<sup>87</sup> Unable to find a clear congressional mandate,<sup>88</sup> the court attempted to reconcile U.S. regulatory interests with the extraterritoriality principle.<sup>89</sup>

In commencing its analysis under NEPA, the *NRDC* court stated its reluctance to apply the statute extraterritorially and noted that "NEPA jurisprudence indicates that exclusively foreign impacts do not automatically invoke the statute's environmental obligations."<sup>90</sup> In fact, the court found NEPA's language "look[ed] toward cooperation, not unilateral action, [such as automatic application of the statute,] in a manner consistent with [U.S.] foreign policy."<sup>91</sup> Although the statute was written in broad general terms, the court held that it "reflect[ed] the perception of a global problem from the American perspective, and offer[ed] a procedural rem-

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84. *Id.*

85. *Id.* at 1356.

86. *Id.* at 1356-57.

87. *Id.* at 1357. "The only exception would be if the legislature were wholly without jurisdiction to prescribe the relevant conduct . . ." *Id.*

88. *Id.* The court also concluded that "NEPA's legislative history illuminates nothing with regard to extraterritorial application." *Id.* at 1367.

89. *Id.* at 1357. The guiding principle for the court was that "[w]e do honor to the sovereignty of national governments, our own included, when we respect foreign public policy by not automatically displacing theirs with ours." *Id.*

90. *Id.* at 1366.

91. *Id.* The court based this on § 102(2)(F) of NEPA which states that all federal government agencies shall: "recognize the worldwide and long-range character of environmental problems and, *where consistent with the foreign policy of the United States*, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." *Id.* (citing 42 U.S.C. § 4332(2)(F) (1989)) (emphasis in original).

edy to assist in a solution for Americans.”<sup>92</sup> Because “Congress can outline national goals for Americans only[,]” and other cultures in other countries will react in their own ways to global problems, any extraterritorial application of U.S. law should be narrowly construed.<sup>93</sup> Failing to find any conclusive congressional intent suggesting extraterritorial application, the court turned its attention to judicial precedents.<sup>94</sup>

In its review of the case law, the *NRDC* court found the previous decisions that did address the application of NEPA beyond U.S. borders were “both factually distinguishable *and* missing the foreign policy element” of the matter before the court.<sup>95</sup> The court distinguished *Wilderness Society v. Morton*<sup>96</sup> on three grounds. First, whereas *Wilderness Society* was an intervention case dealing only with procedural matters, *NRDC* dealt directly with the applicability of NEPA beyond U.S. territory.<sup>97</sup> Second, while *Wilderness Society* posed “no problem with regard to separation of powers or interference in the conduct of foreign relations,” the matter before the court had the potential to adversely affect the United States Philippine relationship.<sup>98</sup> Finally, unlike *Wilderness Society*, the *NRC*

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92. *Id.* at 1366-67.

93. *Id.*

94. *Id.* at 1367.

95. *Id.* (emphasis in original). The court also cited with approval the United States District Court for the District of Columbia’s statement that “[t]he extraterritoriality of NEPA remains an open question in this Circuit.” *Id.* (quoting *National Org. for Reform of Marijuana Laws (NORML) v. United States*, 452 F. Supp. 1226, 1232 (D.D.C. 1978)).

96. 463 F.2d 1261 (D.C. Cir. 1972) (per curiam). See discussion *supra* part II.A.

97. *NRDC v. NRC*, 647 F.2d 1345, 1367 (D.C. Cir. 1981). Unlike *Wilderness Society*, the *NRDC* petitioners were not citizens of a foreign state claiming potential injury. In fact, the court noted that “the direction of foreign antagonism runs against the petitioners themselves, who from non-adjacent America presume that they can represent the Philippine environment.” *Id.* Additionally, the court noted that “*Wilderness* does not address at all the substantive issue whether NEPA extends to a foreign environment,” and “[i]t is entirely silent on . . . whether an EIS must be prepared for a project with no environmental impact within the United States.” *Id.*

98. *Id.* (quoting *Wilderness Society*, 463 F.2d at 1263 (Tamm, J., concurring)). The Department of State had conducted its own studies of the Philippine reactor application to consider the site in view of its proximity to U.S. military facilities and the seismically active location. After discussions with the Philippine Atomic Energy Commission and taking into account foreign policy considerations, the State Department approved the export license. *Id.* 647 F.2d at 1351-52. Additionally, the government of the Philippines raised other foreign policy considerations in its statement that:

[i]f the United States followed a policy of imposing its own regulatory procedures and standards on all host countries involved in advanced technology trade with the United States, such a policy would undoubtedly bode ill for the ability of the United States to maintain military facilities in as many locations around the world as it now does.

*Id.* at 1356 (quoting Brief *Amicus Curiae* of the Republic of the Philippines at 23).

would exercise no ongoing control over the project once the licensing decision was made.<sup>99</sup>

The *NRDC* court noted that its finding NEPA inapplicable to a sovereign nation was "completely consistent with *People of Enewetak* [*v. Laird*],"<sup>100</sup> which applied the statute to United States Trust Territories on the theory they were part of the "Nation" and not sovereign.<sup>101</sup> In its review of *Sierra Club v. Adams*,<sup>102</sup> the court noted that the EIS requirement had *originally* been mandated due to concern about the spread of aftosa to the United States.<sup>103</sup> In *NRDC*, however, there was determined to be no potential impact on the United States.<sup>104</sup> Furthermore, *NRDC*, unlike *Adams* and *Wilderness Society*, showed no ongoing governmental financial responsibility or control over the project.<sup>105</sup> Finally, the court determined that *Adams* held no precedential value as the court "did not decide the NEPA extraterritoriality issue."<sup>106</sup>

Although limiting its holding to nuclear export licensing decisions, the *NRDC* court recognized that the United States may, in many situations, be able to enforce its laws across national borders when it "holds all the cards," such as in a foreign development setting.<sup>107</sup> Nevertheless, the court cautioned that "we should not assign an insignificant place to the foreign political interest."<sup>108</sup> The court went on to suggest "[s]ome balancing, or recognition of latent conflict of laws, would seem judicious to reconcile the separate *but not inconsistent* national interests."<sup>109</sup> One such significant interest is foreign relations, where "[r]esponsibility . . . rests finally in the executive branch to ensure achievement of the nation's foreign policy goal[s]."<sup>110</sup> Determining to what extent environmental review "risks unduly impeding the conduct of United States foreign relations" is left to the courts.<sup>111</sup>

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99. The United States Government would maintain responsibility for the pipeline once it was completed and in operation. *Id.* at 1367-68.

100. 353 F. Supp. 811 (D. Haw. 1973).

101. *NRDC v. NRC*, 647 F.2d at 1368. See discussion *supra* part II.B.

102. 578 F.2d 389 (D.C. Cir. 1978).

103. *NRDC v. NRC*, 647 F.2d at 1368.

104. *Id.*

105. *Id.*

106. *Id.* See discussion *supra* part II.C.

107. *NRDC v. NRC*, 647 F.2d at 1357.

108. *Id.*

109. *Id.* (emphasis in original).

110. *Id.* at 1358.

111. *Id.* One such impediment was that if the EIS requirement was enforced, "there

*E. Greenpeace U.S.A. v. Stone*

The foreign affairs exception to NEPA was further refined in *Greenpeace U.S.A. v. Stone*,<sup>112</sup> which concerned the United States Army's transportation and destruction of obsolete unitary chemical weapons which had been stockpiled in the Federal Republic of Germany (FRG).<sup>113</sup> Three of Greenpeace's claims were based on NEPA and one involved its extraterritorial application.<sup>114</sup> Specifically, Greenpeace contended that the Army improperly segmented the operation instead of considering all parts in a comprehensive EIS.<sup>115</sup> In determining whether NEPA applied to the movement of munitions in Germany and their transoceanic shipment, the United States District Court for the District of Hawaii considered the foreign policy implications that would result from the statute's application.<sup>116</sup> Crucial to the court's determination was that the movement of munitions resulted from an agreement between the President and a foreign head of state.<sup>117</sup> The court considered this to be a

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would be the spectre of litigation over the adequacy of the EIS, with delay the inevitable result." *Id.* at 1366.

112. 748 F. Supp. 749 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991).

113. *Id.* at 752. The United States Army undertook the plan in coordination with the West German Army to remove the munitions from Germany and transport them to a facility on Johnston Atoll where they would be destroyed in the Johnston Atoll Chemical Agent Disposal System (JACADS). *Id.* The transportation involved three phases; transportation of the weapons from their magazines to a railhead in Germany; shipment by rail to a German port facility; and transport by sea to Johnston Atoll. *Id.* at 753.

114. *Id.* at 757. The NEPA complaints not involving extraterritorial application of the statute were that the Army failed to evaluate the full range of alternatives to its action; and that it failed to consider important new information in its second supplemental EIS. *Id.* The non-NEPA complaints were that the Army failed to meet its reporting requirements to Congress as required by the Department of Defense Appropriations Act of 1990, *id.* at 765; and that movement of the weapons violated both the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter. *Id.* at 767.

115. *Id.* at 757.

116. *Id.* The court considered the serious disruption to foreign policy which might result from halting shipments that had been planned and conducted in a joint operation with the German Army. *Id.* at 754. Additionally, German courts had already examined the issue and determined that the plan "complied with German law and the danger posed by the plan was tolerable and did not violate any German constitutional rights." *Id.* at 754. Imposition of NEPA after the German court had found no impact would encroach on the jurisdiction of Germany to implement its own political decisions. *Id.* at 760.

117. *Id.* at 757-58. President Reagan, in an agreement with Chancellor Kohl, promised to remove the chemical munitions prior to December, 1992. Subsequently, President Bush agreed with Chancellor Kohl to speed up the process so that all of the weapons would be out of Germany by December, 1990. *Id.*



legitimate exercise of the President's foreign affairs powers.<sup>118</sup> As NEPA "clearly recognizes . . . actions should be taken 'consistent with the foreign policy of the United States,'" the Presidential agreement was accorded some force in weighing whether NEPA applied.<sup>119</sup>

Keeping the importance of the foreign policy considerations in mind, the court turned its attention to the German phase of the operation.<sup>120</sup> Upon finding that "NEPA's legislative history illuminates nothing in regard to extraterritorial application," the court attempted to determine whether Congress intended NEPA to apply under the facts of the case at bar.<sup>121</sup> The *Greenpeace* court noted that the United States Court of Appeals for the District of Columbia Circuit in deciding *NRDC v. NRC*, had considered that "extraterritorial application of United States regulatory laws might result in a conflict with or a displacement of the foreign sovereign's own regulations."<sup>122</sup> The *Greenpeace* court found itself facing a similar situation, in that extraterritorial application of NEPA would show "a lack of respect for the FRG's sovereignty, authority and control over actions taken within its borders."<sup>123</sup> This was especially true as any environmental impact during the overland transport stage would be felt solely in Germany.<sup>124</sup> Another factor which played a role in the *Greenpeace* court's decision was that Congress had mandated the destruction of the chemical weapons stockpile and the President's actions were in furtherance of that mandate.<sup>125</sup> In setting the schedule for the weapons removal, the President was acting within his foreign policy powers, and although NEPA was a procedural statute, its application would interfere with the substance of the President's commitment.<sup>126</sup> The *Greenpeace*

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118. *Id.* at 758.

119. *Id.* at 758-59 (citing 42 U.S.C. § 4332(2)(F) (1989)).

120. *Id.* at 758.

121. *Id.* at 759 (quoting *NRDC v. NRC*, 647 F.2d 1345, 1367 (D.C. Cir. 1981)). The court found *NRDC* was the "only appellate decision which directly addresses the question of whether NEPA applies extraterritorially to require evaluation of environmental impacts solely within a foreign jurisdiction." *Id.* at 759 n.10.

122. *Id.* at 760 (citing *NRDC v. NRC*, 647 F.2d at 1356-57).

123. *Id.*

124. *Id.* The court was aware that the movement of the weapons was being carried out largely by United States Army personnel, but it felt that German sovereignty and United States foreign policy concerns outweighed the impact on American forces. *Id.* See also *NRDC v. NRC*, 647 F.2d at 1367 (32,000 U.S. Military forces were stationed in the Philippines near the site of the proposed reactor. The State Department initially withheld permission for an export license but after receiving diplomatic assurances, and taking into account foreign policy considerations, it withdrew its objection.).

125. *Stone*, 748 F. Supp. at 761.

126. *Id.* The court went so far as to note, "[p]laintiffs' assertion that application of

court concluded that NEPA did not apply to the movement of munitions within Germany because it would result in "grave foreign policy implications and would substantively interfere with a decision of the President and a foreign sovereign in a manner not intended or anticipated by Congress."<sup>127</sup>

The court next considered NEPA's application to the transoceanic shipment phase of the operation. The court began its analysis by noting that, unlike the German transport phase, the seaborne phase was not "within the sovereign borders of a foreign nation or in concert with that foreign nation."<sup>128</sup> Because the shipment was over the global commons, "foreign policy considerations . . . are not implicated to the same extent."<sup>129</sup> Another difference was that under Executive Order 12,114, the Army was required to prepare a written assessment of the impact of its operations on the global commons.<sup>130</sup> Prior to commencement of the weapons shipment, that assessment was completed for all the potential sea routes between Germany and Johnston Atoll.<sup>131</sup> The study concluded that "normal operations . . . would cause no significant impact on the environment of the global commons, assuming that none of the low probability accidents examined actually occur."<sup>132</sup> The *Greenpeace* court was persuaded that although Executive Order 12,114 did not preempt NEPA's application overseas, compliance with the order would be given weight in determining whether the global commons transoceanic shipment phase of the operation must be incorporated into the EIS for Johnston Atoll

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NEPA to the defendants' action within West Germany would not substantively interfere with executive action ignores reality." *Id.*

127. *Id.* The court emphasized that its decision was limited to the specific facts of the case. *Id.*

128. *Id.* at 761.

129. *Id.* "'Global commons' signifies the high seas, Antarctica, and portions of the atmosphere outside the sovereign jurisdiction of a single nation." *NRDC v. NRC*, 647 F.2d at 1348 n.8 (citation omitted).

130. Exec. Order No. 12,114, *supra* note 26, §§ 2-3(a), 2-4(b)(i).

131. *Greenpeace U.S.A. v. Stone*, 748 F. Supp. 749, 761 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991). The global commons environmental assessment discussed "the effects of the transportation on water quality; air quality; the risks to threatened, endangered and special interest species; risks to commercial fisheries and to the human population." *Id.* at 761-62 (citations and footnote omitted).

132. *Id.* at 762 (quoting Finding of No Significant Impact, Apr. 30, 1990). Only complete loss of the ship, uncontrollable fire, or large terrorist attack would cause release of contaminants according to the Global Commons Environmental Assessment. These events were not determined to be likely to occur as the transport ship would be escorted along the route. In fact, the study determined that there was only 1 in 500,000 chance of human casualties occurring. *Id.* at 762 n.14.

Chemical Agent Disposal System (JACADS).<sup>133</sup> Additionally, the court noted that the movement through the global commons was "a necessary consequence" of the removal of the munitions from Germany and their destruction on Johnston Atoll.<sup>134</sup> The *Greenpeace* court found the German phase of the operation more compelling, and applied the foreign policy concerns it had annunciated earlier.<sup>135</sup> With these foreign policy considerations and the Army's preparation of a Global Commons Environmental Assessment (GCEA) taken into account, the court found itself compelled to conclude that NEPA had not been violated by the failure "to consider the transoceanic shipment of chemical munitions to Johnston Atoll in the same comprehensive EIS as the incineration of those munitions."<sup>136</sup>

*F. Environmental Defense Fund, Inc. v. Massey*

In *Environmental Defense Fund, Inc. v. Massey*,<sup>137</sup> the extent of NEPA's application to sovereignless extraterritorial areas was examined. The Environmental Defense Fund (EDF) had brought a suit in the United States District Court for the District of Columbia seeking to prevent the National Science Foundation (NSF) from incinerating its food wastes in Antarctica.<sup>138</sup> NSF had previously burned its McMurdo Station<sup>139</sup> food wastes in an open pit, but in an attempt to improve its environmental practices, it decided to begin incinerating the waste.<sup>140</sup> While waiting for a new "state-of-the-art" incinerator, NSF planned to dispose of the waste through the use of an "interim incinerator."<sup>141</sup> The EDF opposed this plan, contending that the incineration might "produce highly toxic pollutants which could be hazardous to the environment,"<sup>142</sup>

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133. *Id.* at 762.

134. *Id.*

135. *Id.*

136. *Id.*

137. 986 F.2d 528 (D.C. Cir. 1993).

138. *Environmental Defense Fund v. Massey*, 772 F. Supp. 1296, 1297 (D.D.C. 1991), *rev'd*, 986 F.2d 528 (D.C. Cir. 1993).

139. The court noted that:

McMurdo Station is one of three year-round installations that the United States has established in Antarctica, and over which NSF exercises exclusive control. All of the installations serve as platforms or logistic centers for U.S. scientific research; McMurdo is the largest of the three, with more than 100 buildings and a summer population of approximately 1200.

*Massey*, 986 F.2d at 529.

140. *Id.* at 529-30.

141. *Id.*

142. *Id.* at 530.

and that "NSF [had] not prepared the proper environmental analysis as required under [NEPA],<sup>143</sup> . . . regulations of the Council on Environmental Quality<sup>144</sup> . . . and Executive Order 12,114<sup>145</sup>."<sup>146</sup> Specifically, EDF sought declaratory and injunctive relief under NEPA section 102(2)(C),<sup>147</sup> stating that NSF had violated the Act's EIS requirement.<sup>148</sup> In its analysis, the district court relied on *Equal Opportunity Employment Commission v. Arabian American Oil Co. (ARAMCO)*<sup>149</sup> to support the contention that a statute may apply extraterritorially only when "the affirmative intention of the Congress [is] clearly expressed."<sup>150</sup> Finding no such intent,<sup>151</sup> the district court dismissed the case citing a lack of subject matter jurisdiction.<sup>152</sup>

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the issue was framed as "whether the application of NEPA to agency actions in Antarctica presents an extraterritoriality problem at all."<sup>153</sup> The court separated this determination into two parts. The first test was "whether the statute [sought] to regulate conduct in the United States or in another sovereign country."<sup>154</sup> If action in a foreign country was implicated, then the second test was "whether NEPA would create a potential for 'clashes between our laws and those of other nations'" when applied to federal agency decision making regarding proposed actions.<sup>155</sup>

In the first part of its analysis, the D.C. Circuit examined the presumption against the extraterritorial application of statutes. This presumption has been defined as "[r]ules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring

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143. NEPA, *supra* note 1.

144. 40 C.F.R. §§ 1500-1508 (1990).

145. Exec. Order No. 12,114, *supra* note 26.

146. *Environmental Defense Fund v. Massey*, 772 F. Supp. 1296, 1297 (D.D.C. 1991), *rev'd*, 986 F.2d 528 (D.C. Cir. 1993).

147. 42 U.S.C. § 4332(2)(C) (1988).

148. *Massey*, 986 F.2d at 529.

149. 499 U.S. 244 (1991).

150. *Massey*, 772 F. Supp. at 1297 (quoting *ARAMCO*, 499 U.S. at 248).

151. After noting NEPA's language, the court stated that "[w]hile Congress may have selected broad language to describe NEPA's purpose, Congress failed to provide a clear expression of legislative intent through a plain statement of extraterritorial statutory effect." *Id.*

152. *Id.* at 1298. The court concluded that "NEPA does not apply extraterritorially and Executive Order 12,114 does not provide for a private cause of action." *Id.*

153. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993).

154. *Id.*

155. *Id.* (citation omitted).

within, or having effect within, the territory of the United States," unless the contrary is clearly indicated by the statute.<sup>156</sup> The *Massey* court prefaced its analysis with the recognition that in *Equal Employment Opportunity Commission v. Arabian American Oil Co. (ARAMCO)*,<sup>157</sup> the Supreme Court had reaffirmed the vitality of the extraterritorial principle.<sup>158</sup> However, the *Massey* court noted three exceptions to the general presumption against extraterritorial application.<sup>159</sup> First, the presumption would be precluded when "there is 'an affirmative intention of the Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations."<sup>160</sup> Second, an exception would be made "where the failure to extend the scope of the statute to a foreign setting [would] result in adverse effects within the United States."<sup>161</sup> By way of illustration, the court cited the Sherman Anti-Trust Act,<sup>162</sup> and the Lanham Act,<sup>163</sup> which had both been found to apply extraterritorially because "failure to extend the statute[s'] reach would have negative economic consequences within the United States."<sup>164</sup> Finally, the presumption would be invalid where the "conduct regulated by the government occurs within the United States."<sup>165</sup> This is so "[e]ven where the significant effects of the regulated conduct are felt outside U.S. borders."<sup>166</sup>

With the extraterritorial principle and its exceptions in mind, the court turned to examination of the conduct to be regulated under NEPA. The *Massey* court found "NEPA is designed to control the decisionmaking

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156. *Id.* at 530 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, cmt. g (1987)).

157. 499 U.S. 244 (1991).

158. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993).

159. *Id.* at 531.

160. *Id.* (quoting *ARAMCO*, 499 U.S. at 248).

161. *Id.* at 531.

162. 15 U.S.C. §§ 1-7 (1976).

163. *Id.* §§ 1051-1128 (1988).

164. *Environmental Defense Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993). The use of these two statutes may not have been the best example of extraterritorial reach due to potential adverse effects in the United States. See Turley, *supra* note 6, at 634-38 (1990) (difference in extraterritorial treatment of market-based statutes such as Anti-Trust and Trademark Acts and non-market based statutes such as NEPA are discussed). Perhaps a better example would be *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978). In *Sierra Club*, due to the danger that hoof and mouth disease would spread to the United States an EIS was required before funds could be allocated to the completion of the last section of the Pan American Highway, even though all construction was to be in Panama. *Id.* at 391.

165. *Massey*, 986 F.2d at 531.

166. *Id.*

process of U.S. federal agencies, not the substance of agency decisions."<sup>167</sup> The court also noted that NEPA's EIS requirement only binds American officials in the process of their decisionmaking.<sup>168</sup> Critical in the court's determination though, was its contention that "[b]ecause the decisionmaking processes of the federal agencies take place almost exclusively in this country and involve the workings of the United States government, they are uniquely domestic."<sup>169</sup> It further explained that NEPA "creates no substantive environmental standards and simply prescribes by statute the factors an agency must consider when exercising its discretionary authority."<sup>170</sup> Finding that NEPA was "designed to regulate conduct occurring within the territory of the United States, and [that it] imposes no substantive requirements which could be interpreted to govern conduct abroad," the court concluded that the presumption against extraterritoriality did not apply.<sup>171</sup>

Having ruled the presumption against extraterritoriality did not apply, the court went on to examine the status of Antarctica and the foreign policy implications which would result from application of NEPA. The court reasoned that Antarctica's unique status as a "sovereignless continent" supported its conclusion not to apply the presumption.<sup>172</sup> The *Massey* court distinguished *Aramco* by recalling the Supreme Court's statement that "courts should look to see if there is any indication that Congress intended to extend the statute's coverage 'beyond places over which the United States has sovereignty or some measure of legislative

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167. *Id.* at 532. The court concluded that "[b]y enacting NEPA, Congress exercised its . . . discretion, and created a process whereby American officials, while acting within the United States, can reach enlightened policy decisions by taking into account environmental effects." Such discretion was a legitimate exercise of Congress' authority without any extraterritoriality concerns. *Id.*

168. *Id.*

169. *Id.* at 532 (citing Mary A. McDougall, *Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 435, 445 (1991)). The court observed that "NEPA, unlike many environmental statutes, does not dictate agency policy or determine the fate of contemplated action." *Id.* (citations omitted).

170. *Id.* at 533. The court commented that NEPA was akin to other "laws directing federal decisionmakers to consider particular factors before extending aid or engaging in certain types of trade." *Id.* (citing Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 371 (1982)). The court cited as examples the Foreign Assistance Act of 1961 and the Nuclear Nonproliferation Act. *Id.* These examples are unconvincing for, unlike NEPA, one need look no further than their face to determine the extraterritorial scope of the laws.

171. *Id.*

172. *Id.* at 534. Antarctica was said to be "not a foreign country," but analogized to outer space. *Id.* at 533 (quoting *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984)).

control.”<sup>173</sup> The court determined that the United States does exert some measure of legislative control in this situation because it controls all air transportation to Antarctica and exercises legislative control over McMurdo Station and other American research installations. In view of the legislative control it had found, as well as Antarctica’s unique status, the court was compelled to conclude that “the presumption against extra-territoriality [was] particularly inappropriate.”<sup>174</sup>

The court held that Antarctica, a sovereignless area of the global commons, did not “present the challenges inherent in the relations between sovereign nations.”<sup>175</sup> The National Science Foundation argued, however, that application of NEPA would make “the [United States] a doubtful partner for future international cooperation in Antarctica” because of the risk of NEPA injunctions.<sup>176</sup> The court found this argument unpersuasive as it was not convinced NSF’s ability to cooperate with other nations would be hampered by NEPA injunctions.<sup>177</sup> The court reasoned that where NEPA’s section 102(2)(C) EIS requirement conflicted with its section 102(2)(F) mandate of cooperation with other nations, the EIS requirement would have to yield.<sup>178</sup> While the *Massey* court applied NEPA’s EIS requirement to NSF’s actions in Antarctica, it noted that foreign policy considerations may potentially outweigh the benefits of an impact statement and prevent the statute’s application.<sup>179</sup> The court left for another day the determination of how those policy considerations might be balanced in a case involving a sovereign nation.<sup>180</sup>

*G. Smith v. United States and Sale v. Haitian Centers Council, Inc.*

Two United States Supreme Court cases decided after *Massey* have shed further light on NEPA’s extraterritorial reach. Although not NEPA

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173. *Id.* (quoting *Equal Employment Opportunity Comm’n v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991)).

174. *Id.* at 534. The court compared the amount of control the United States exercised in Antarctica with that shown in two previous NEPA cases, *People of Enewatak v. Laird*, 353 F. Supp. 811 (D. Haw. 1973) and *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978). *Massey*, 986 F.2d at 533; see discussion of *Enewatak* and *Adams* *supra* part II.B-C.

175. *Massey*, 986 F.2d at 534. However, Antarctica is not without its international controversies. See *Smith v. United States*, 113 S. Ct. 1178, 1180 n.1 (1993) (describing Antarctica as “an entire continent of disputed territory”).

176. *Massey*, 986 F.2d at 534.

177. *Id.* at 535.

178. *Id.*

179. *Id.*

180. *Id.* at 537.

cases, *Smith v. United States*<sup>181</sup> and *Sale v. Haitian Centers Council, Inc.*<sup>182</sup> appear to limit *Massey's* application. *Smith* involved a question of whether the Federal Tort Claims Act (FTCA)<sup>183</sup> applied to tortious acts or omissions occurring in Antarctica.<sup>184</sup> *Haitian Centers* examined whether a procedural section of the Immigration and Nationality Act (INA)<sup>185</sup> was applicable outside the United States.<sup>186</sup> In both cases, the Supreme Court reached conclusions diametrically opposed to the reasoning of the *Massey* court.

In *Smith v. United States*, Sandra Jean Smith, the petitioner, filed a wrongful death action under the FTCA.<sup>187</sup> The United States District Court for the District of Oregon dismissed the claim, finding it barred by the foreign country exception to the FTCA.<sup>188</sup> In deciding the case, the Supreme Court examined both the meaning of the FTCA phrase "any claim arising in a foreign country,"<sup>189</sup> and the general application of statutes outside of the United States.<sup>190</sup> Much like the *Massey* court's reasoning, Smith argued that U.S. law should apply because Antarctica was not a country, demonstrated by the fact that the United States had not recognized the legitimacy of another nation's claim over it.<sup>191</sup> The Court, however, determined that a more "commonsense meaning of the term" "country" should apply.<sup>192</sup> To find that meaning, the Court looked first to the dictionary and found "country" defined as "a region or tract of land."<sup>193</sup> The Court recognized that other interpretations of the term were possible, but held "the ordinary meaning of the language itself . . . includes Antarctica, even though it has no recognized government."<sup>194</sup>

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181. 113 S. Ct. 1178 (1993).

182. 113 S. Ct. 2549 (1993).

183. 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (1988 & Supp. II 1990).

184. *Smith*, 113 S. Ct. at 1180.

185. 8 U.S.C. § 1253(h)(1) (Supp. IV 1988).

186. *Haitian Centers*, 113 S. Ct. at 2552.

187. *Smith v. United States*, 113 S. Ct. 1178, 1180-81 (1993). Petitioner's husband worked for the National Science Foundation at McMurdo Station in Antarctica. He was killed when he fell into a crevasse after he left the marked trail on a recreational hike. The wrongful death action alleged "that the United States was negligent in failing to provide adequate warning of the dangers posed by crevasses in areas beyond marked paths." *Id.* at 1180.

188. *Id.*

189. 28 U.S.C. § 2680(k).

190. *Smith*, 113 S. Ct. at 1181, 1183.

191. *Id.* at 1181.

192. *Id.*

193. *Id.* (quoting WEBSTERS NEW INTERNATIONAL DICTIONARY 609 (2d ed. 1945)).

194. *Id.*



After a discussion of the FTCA, the Court turned to the presumption against extraterritorial application of statutes. The Court reiterated "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>195</sup> Because the petitioner could not show there was clear evidence of congressional intent to apply the FTCA to Antarctica, she, like the *Massey* court, argued that the presumption applies only if it serves to avoid "unintended clashes between our laws and those of other nations which could result in international discord."<sup>196</sup> The Court did not find the argument convincing, however, and concluded "the presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind."<sup>197</sup>

The second Supreme Court case appearing to limit *Massey's* application, *Haitian Centers*, involved an attempt by organizations representing interdicted Haitians to obtain a restraining order against the United States Coast Guard to prevent the return of intercepted Haitians without a determination of their refugee status.<sup>198</sup> *Haitian Centers Inc.*, the respondent, contended that the plain language of INA § 243(h)(1) was dispositive in preventing the return of the refugees.<sup>199</sup> The Supreme Court found that Part V of the INA contained no reference to extraterritorial application and it could not "reasonably construe § 243(h) to limit the Attorney General's actions in geographic areas where she [had] not been authorized to conduct [deportation hearings]."<sup>200</sup>

In its examination of extraterritorial statutory application, the Supreme Court dealt with a Court of Appeals holding which paralleled the reason-

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195. *Id.* at 1183 (quoting *Equal Employment Opportunity Comm'n v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991)).

196. *Id.* at 1183 n.5 (citations omitted).

197. *Id.* The Court also did not find convincing the argument that the presumption was defeated "because the FTCA specifically addresses the issue of extraterritorial application in the foreign country exception." Instead, the "presumption, far from being overcome, . . . [was] doubly fortified by the language of th[e] statute and the legislative purpose underlying it." *Id.* at 1183. Such an observation may equally be true for NEPA as § 102(2)(F) of the Act showed that Congress could address foreign concerns when it so desired. See 42 U.S.C. § 4332(2).

198. *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2552, 2556 (1993).

199. *Id.* at 2558. Section 243(h)(1) reads, "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act § 243(h)(1), 8 U.S.C. § 1253(h)(1).

200. *Haitian Centers*, 113 S. Ct. at 2560.

ing in *Massey*. In *Haitian Centers*, the Second Circuit had stated, "the presumption against extraterritoriality had 'no relevance in the present context' because there was no risk that § 243(h), which can be enforced only in the United States courts against the United States Attorney General, would conflict with the laws of other nations."<sup>201</sup> The Court, reaffirming the vitality of the presumption against extraterritoriality and applying it to the procedural aspects of a statute, noted that "the presumption has a foundation broader than the desire to avoid the conflict with the laws of other nations."<sup>202</sup> This holding appears to limit the value of *Massey's* application to Antarctica and the global commons.<sup>203</sup>

#### H. NEPA Coalition of Japan v. Aspin

*NEPA Coalition of Japan v. Aspin*,<sup>204</sup> the first extraterritorial application case decided post *Massey*, *Smith*, and *Haitian Centers*, explicitly states the foreign policy exception to NEPA. In *NEPA Coalition*, plaintiffs, a coalition of Japanese citizens and environmental groups, sought a declaration that the United States Navy had violated NEPA.<sup>205</sup> The NEPA Coalition contended that the Navy's decision not to prepare an EIS or satisfy "other requirements of the NEPA process" for its activities connected with United States military bases in Japan evidenced non-compliance.<sup>206</sup> In an attempt to overcome the Navy's main defense, the presumption against extraterritoriality, the NEPA Coalition relied upon *Environmental Defense Fund v. Massey*,<sup>207</sup> asserting that *Massey* had

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201. *Id.* (quoting *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1358 (2d Cir. 1992)). Compare *Environmental Defense Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993) ("[S]ince NEPA is designed to regulate conduct occurring within the territory of the United States, and imposes no substantive requirements which could be interpreted to govern conduct abroad, the presumption against extraterritoriality does not apply to this case.").

202. *Haitian Centers*, 113 S. Ct. at 2560 (quoting *Smith v. United States*, 113 S. Ct. 1178, 1183 n.5 (1993)).

203. H.R. 3532, a bill to implement the Protocol on Environmental Protection to the Antarctic Treaty would apply NEPA's EIS requirement to Federal activities in Antarctica. The legislation also authorizes the Administrator of the EPA to promulgate regulations providing for environmental impact assessment of non-governmental activities. *Antarctic Environmental Protection Act of 1993: Hearings on H.R. 3532 Before the Subcomm. on Science of the House Committee on Science, Space and Technology*, 103d Cong., 2d Sess. (1994) (Statement of R. Tucker Scully, Director, Office of Ocean Affairs, Department of State).

204. 837 F. Supp. 466 (D.D.C. 1993).

205. Pls.' 1st Am. Compl. at 5-6, *NEPA Coalition of Japan v. Cheney* (No. 91-1522), decided *sub nom.* *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

206. *Id.* at 6.

207. 986 F.2d 528 (D.C. Cir. 1993).

"eviscerate[d]" the presumption against extraterritoriality.<sup>208</sup> They based this argument on the *Massey* court's holding that the decision making processes of federal agencies are "uniquely domestic."<sup>209</sup> Additionally, the Coalition contended that because it was not seeking injunctive relief and because compliance with NEPA would not result in any statutory conflict, none of the foreign policy considerations raised in *Massey* would apply.<sup>210</sup>

At the conclusion of a hearing before the United States District Court for the District of Columbia, Judge Pratt found NEPA inapplicable and granted summary judgment for the government.<sup>211</sup> The court did not consider *Massey* controlling as it determined that "the legal status of United States bases in Japan [were] not analogous to the status of American research stations in Antarctica."<sup>212</sup> With *Massey* distinguished, the court examined the circumstances of the matter before it, keeping in mind that "[a]ny doubts concerning the extraterritorial application of statutes must be resolved restrictively."<sup>213</sup> The court found that Department of Defense (DOD) operations in Japan were governed by the Treaty of Mutual Cooperation and Security of 1960,<sup>214</sup> as well as the Status of Forces Agreement,<sup>215</sup> which provide for mechanisms that address the concerns of the Coalition.<sup>216</sup> The court concluded that "requiring the DOD to prepare EISs, . . . would risk intruding upon a long standing treaty relationship."<sup>217</sup> Because the Coalition was "unable to show that

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208. Pls.' Mem. in Reply to Resp. of Defs. to Pls.' Notice of Filing at 1, *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

209. *Id.* at 3.

210. *Id.* at 4.

211. *NEPA Coalition*, 837 F. Supp. at 467.

212. *Id.* The court observed that *Massey* involved the unique status of Antarctica and that the Court of Appeals had expressly limited its ruling by refusing to decide whether NEPA might apply to actions involving a sovereign nation. *Id.* (citing *Environmental Defense Fund v. Massey*, 986 F.2d 528, 537 (D.C. Cir. 1993)).

213. *Id.* (citing *Smith v. United States*, 113 S. Ct. 1178, 1182 (1993)).

214. Treaty of Mutual Cooperation and Security, June 21-22, 1960, U.S.-Japan, 11 U.S.T. 1632, 1633-35.

215. Administrative Agreement under Article III of the Security Treaty Between the U.S. and Japan, Feb. 28, 1952, U.S.-Japan, 3 U.S.T. 3341, 3342-62.

216. *NEPA Coalition*, 837 F. Supp. at 467. The treaty established a Joint Japanese/American Committee and calls for fifteen standing subcommittees. Among the subcommittees is the Committee on Environment and Noise Abatement which would have jurisdiction over the type of claims made by the NEPA Coalition. *Id.*

217. *Id.* Deputy Secretary of State Clifton R. Wharton stated in his declaration that: unilateral application of United States legal and regulatory procedures to activities within . . . Japan . . . without the prior consent of the Government of Japan, would impinge on Japanese national sovereignty. This could prove disruptive of

Congress intended NEPA to apply in situations where there is a substantial likelihood that treaty relations will be affected," the court had no difficulty in applying the presumption against extraterritoriality.<sup>218</sup> The court also noted that "even if NEPA did apply . . . no EISs would be required because U.S. foreign policy interests outweigh the benefits from preparing an EIS."<sup>219</sup> Finally, the court limited its holding to those cases in which "clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power" are implicated, leaving for another time the determination of whether NEPA applies in other contexts.<sup>220</sup>

### III. POLICY CONSIDERATIONS IN THE EXTRATERRITORIAL APPLICATION OF NEPA

On a number of occasions, members of the House of Representatives and the Senate have sponsored bills proposing to amend the National Environmental Policy Act of 1969.<sup>221</sup> Other bills would require the federal government to analyze the environmental effect of its actions outside the United States.<sup>222</sup> These bills have called for strict overseas application of NEPA.<sup>223</sup> To date none have passed.<sup>224</sup> Although NEPA should

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local Japanese politics, interfere with existing treaty arrangements, and disrupt ongoing operations to the detriment of United States relations with Japan.

Decl. of Clifton R. Wharton at ¶7, *NEPA Coalition*, 837 F. Supp. 466. Japanese sovereignty might be threatened because, "NEPA procedures could require the U.S. Government to conduct intrusive inquiries through the collection and assessment of environmental, economic, and social data from neighboring communities and areas inside Japan." Furthermore, the Japanese Government would be highly sensitive to such activities and would regard it as "an inappropriate and impermissible intrusion into Japanese sovereignty, and inconsistent with U.S. rights under international law and our relevant bilateral defense agreements." *Id.* at ¶8, *NEPA Coalition*, 837 F. Supp. 466.

218. *NEPA Coalition*, 837 F. Supp. at 467-68.

219. *Id.* at 468 (citations omitted).

220. *Id.*

221. H.R. 3219, 103d Cong., 1st Sess. (1993); S. 1278, 102d Cong., 1st Sess. (1991); S. 1089, 101st Cong., 1st Sess. (1989).

222. H.R. 1113, 101st Cong., 1st Sess. (1989) (CEQ to issue regulations to increase analysis to address the effects of global warming, ozone depletion, and other worldwide concerns).

223. The most recent bill introduced by Representative Owens (D-NY) in the height of the controversy over the North American Free Trade Agreement would have made NEPA applicable to extraterritorial actions of the federal government. 139 CONG. REC. H7452 (daily ed. Oct. 5, 1993) (statement of Rep. Owens). The bill would amend the environmental impact section of NEPA as follows:

Section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332) is amended-

(1) by inserting "(a)" before "The Congress authorizes" and

be modified to make its applicability explicit, the new amendment should provide for the foreign policy exemption and consideration should be given to avoid any damage to United States diplomatic initiatives.

*A. U.S. Foreign Relations Policy Implications Tending to Defeat Extraterritorial Application*

Administration officials, Republicans and Democrats alike, have contended that extraterritorial application of NEPA would act as a major constraint on foreign policy.<sup>225</sup> Mandatory application of NEPA would, in fact, affect the ability of the United States to conduct negotiations with foreign nations<sup>226</sup> and complete them in a timely manner.<sup>227</sup> A prime

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(2) by inserting at the end of the following:

(b)(1) The requirement to include detailed statements under subsection (a)(2)(c) applies to extraterritorial major Federal actions significantly affecting the environment.

(b)(2)(A) The President shall include with each proposal by the President or the Executive Office of the President for legislation to implement any trade agreement significantly affecting the environment that is signed after December 16, 1992, a detailed statement in accordance with the requirements applicable under subsection (a)(2)(C) to an extraterritorial major Federal action of an agency.

(B) Any person aggrieved by a failure of the President to comply with subparagraph (A) may in a civil action obtain an appropriate relief.

(b)(3) In this subsection, the term extraterritorial major Federal action—  
(A) includes any major Federal action in the United States that has effects outside the United States; and

(B) does not include any Federal action taken to protect the national security of the United States, votes in international conferences and organizations, actions taken in the course of an armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions.

H.R. 3219, 103d Cong., 1st Sess. (1993).

224. Representative Mike Synar, (D-Okla.), for instance, has recognized that NEPA must be clarified in order to apply it to extraterritorial U.S. actions. However, with the large number of other environmental statutes up for renewal, he noted that it is not likely that NEPA will be amended soon. Interview with Mike Synar, Member, House of Representatives, in Washington, D.C. (July 18, 1994) (notes on file with author).

225. The chairman of the White House Council on Environmental Quality under President Bush urged that NEPA not be reauthorized because of its potential for interference with foreign policy. *White House Opposes NEPA Reauthorization, Officials Cite Foreign Policy Constraints*, 10 Int'l Env'tl. Rep. (BNA) No. 14, at 398 (July 17, 1991). The Clinton Administration also followed this line of reasoning in their appellate brief for *Public Citizen v. U.S. Trade Representative*, 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994). *Government Asks Appeals Court to Overturn Impact Statement Decision*, 16 Int'l Env'tl. Rep. (BNA) No. 15, at 544 (July 28, 1993).

226. Use of NEPA would have a deleterious effect on negotiations because of "the need

example of what could happen if NEPA were applied indiscriminately can be found in *Public Citizen v. U.S. Trade Representative*,<sup>228</sup> which was brought, in part, to question U.S. trade policy as a whole.<sup>229</sup> In *Public Citizen*, Judge Richey of the United States District Court for the District of Columbia ruled that "the actions of the . . . Office of the United States Trade Representative in negotiating, drafting, and signing the [North American Free Trade Agreement (NAFTA) were] subject to review under . . . NEPA."<sup>230</sup> The court then ordered the government to prepare an environmental impact statement on NAFTA "with all deliberate speed."<sup>231</sup> Although the case was eventually decided on other grounds,<sup>232</sup> the government contended the delay caused by the preparation of an EIS would undermine the President's commitment to U.S. trade partners, "resulting in uncertainty expressed by the governments of Canada and Mexico as well as other trading partners concerning the President's ability to proceed with NAFTA and with the negotiations now under way on additional agreements to address environmental concerns."<sup>233</sup>

Beyond the foreign policy concerns involved in negotiating treaties and international agreements, unrestricted application of the NEPA to foreign actions of the Department of Defense could have a severe impact on

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for flexibility, speed, secrecy, and respect in dealing with foreign countries." *White House Opposes NEPA Reauthorization, Officials Cite Foreign Policy Constraints*, *supra* note 225, at 398.

227. The "submission of international trade agreements [and treaties] could be held up for years while an EIS was being prepared and its adequacy litigated . . ." *Government Asks Appeals Court to Overturn Impact Statement Decision*, *supra* note 225, at 544 (quoting *amicus* brief of the National Assoc. of Manufacturers for *Public Citizen v. U.S. Trade Rep.*, 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994)).

228. 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

229. Patty Goldman, the senior litigator, said *Public Citizen* brought the "case not just focused on the NAFTA but looking at the way trade policy is developed in a broader sense." *All Things Considered: Appeals Court Requires No NAFTA Environmental Statement* (Nat'l. Pub. Radio broadcast, Sept. 24, 1993), available in LEXIS, Nexis Library, NPR File.

230. *Public Citizen*, 822 F. Supp. at 30.

231. *Id.*

232. The decision of the Court of Appeals turned on the fact that the treaty would be submitted to the Congress by the President, and as such did not constitute final agency action. See *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 553 (D.C. Cir. 1993).

233. *Government Asks Appeals Court to Overturn Impact Statement Decision*, *supra* note 225, at 544 (July 28, 1993) (citing Brief for the U.S. Trade Representative, *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-5212)).

national security.<sup>234</sup> Although courts have allowed challenges to United States military domestic actions by its own citizens,<sup>235</sup> application of NEPA outside the United States might significantly interfere with U.S. security relationships involving other foreign nations.<sup>236</sup> Additionally, in an application most certainly not anticipated by Congress, foreign individuals might attempt to utilize NEPA to block U.S. military actions overseas.<sup>237</sup>

Although not strictly related to foreign policy concerns, the extraterritorial application of NEPA could have an impact on U.S. relations with other nations, as NEPA would represent an additional tool for those intent upon blocking manufacturing plant relocations outside the United States.<sup>238</sup> By bringing a lawsuit questioning the sufficiency of the impact statement, the group opposing the move might be able to delay the plant relocation until the company lost interest or enough public support had been built to prevent the move.<sup>239</sup>

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234. Additionally, strict application of NEPA to the open ocean portion of the global commons could restrain United States Navy operations and readiness.

235. Military actions have been attacked with NEPA's EIS provisions on a number of occasions. See *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988) (attempt to prevent construction of aircraft carrier home port facility); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977) (attempt to prevent the construction of a submarine base in Washington State); *Comm'n for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796 (D.C. Cir. 1971) (attempt to enjoin underground nuclear test); *Greenpeace U.S.A. v. Stone*, 748 F. Supp. 749 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991) (attempt to enjoin movement and destruction of chemical weapons); *People of Enewetak v. Laird*, 353 F. Supp. 811 (D. Haw. 1973) (test of strategic defenses).

236. Resp. to Pls.' Notice of Filing at 10-13, *NEPA Coalition v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

237. See generally discussion of NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993) *supra* part II.H; *Mayor Will Travel to U.S. to Oppose Military Housing Development*, 11 Int'l Env'tl. Rep. (BNA) 134 (Feb. 10, 1988) (mayor of Zushi City, Japan, wanted NEPA changed so it applied to all military facilities). Cf. *Stone*, 748 F. Supp. at 754 (attempt by German citizens to prevent the movement of U.S. Army chemical weapons in the F.R.G.).

238. Cf. Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1847-51 (1993) (use of environmental claims inside the United States are discussed as a tool to block plant relocation).

239. A group opposed to U.S. Steel's construction of a steel mill at a greenfield site and favoring modernization of an existing location was able to delay construction of a new plant until U.S. Steel abandoned the project. *Id.* at 1848-51 (citing *Lake Erie Alliance for the Protection of the Coastal Corridor v. United States Army Corps of Engineers*, 486 F. Supp. 707, 709 (W.D. Pa. 1980)).

*B. Foreign Policy Concerns Tending to Advance Extraterritorial Application*

While there are many reasons for avoiding strict application of NEPA in an extraterritorial setting, other considerations may dictate that it should apply in some manner. The strongest case for an extraterritorial application of NEPA is that the United States is a signatory to the Convention on Environmental Impact Assessment in a Transboundary Context.<sup>240</sup> In signing the Convention, the United States pledged to "take the necessary legal, administrative or other measures to implement the provisions of [the] Convention, including . . . the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment . . . described [in the Convention]."<sup>241</sup> The United States further pledged to issue an impact assessment prior to a decision to authorize, within its jurisdiction, any of a specified number of actions that are "likely to cause a significant transboundary impact."<sup>242</sup> In keeping with our responsibilities under international law, the United States should take actions to implement the treaty. One course of action to do so would be to amend NEPA.

IV. CONCLUSION

The National Environmental Policy Act of 1969 fails to define its international application. As the law has developed to date, NEPA's EIS requirement will not be applied when there are significant foreign policy concerns or the United States does not exercise a large degree of control over the proposed action. Executive Order 12,114 was a welcome addition in filling the gap, because it mandated that an environmental assessment be completed for actions which have foreign effects. NEPA, however, should be amended to clearly specify the scope of its extraterritorial reach. Explicit language from Congress would not only allow the United States to fulfill its obligations under the Convention on Environmental Impact Assessment in a Transboundary Context, but it may also help prevent applications that would cause embarrassment to the nation and damage to its foreign policy. At a minimum, the amended NEPA should apply to actions in the United States that have consequences be-

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240. 30 I.L.M. 800 (1991).

241. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, art. 2 para 2, 30 I.L.M. 800, 803.

242. *Id.* at art 2 para 3, 30 I.L.M. at 804. Appendix I of the Convention specifies a list of 17 activities that could result in transboundary air or water pollution. *Id.* at Appendix I.



yond our borders. Such a provision should, of course, not be applied merely because the decision making occurred in the United States. Perhaps a better approach would be to amend the statute to apply extraterritorially, while recognizing and providing for all of the foreign policy and national security interests described in the Executive Order. With these proposed changes, it may be easier "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations."<sup>243</sup>

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243. 42 U.S.C. § 4331(a).